Supreme Court, U.S.
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No. 06-1402

In The

Supreme Court of the United States

ROBERT WILLIAMS,

Petitioner,

v.

HOME DEPOT U.S.A., INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In Employment Discrimination and Retaliation Title VII litigation, the Second Circuit has affirmed that summary judgment is "ordinarily inappropriate" and is "sparingly" used where "intent" and "state of mind" is in question. Additionally, *Pro-se* cases must be "liberally construed" (Second Circuit). When a *Pro-se* litigant has proven "intentional discrimination" and has also provided "sufficient evidence" to survive Summary Judgment, do the Courts in question have the power to depart from the Constitution, civil rights and the "accepted" and Usual Summary Judgment "Standard of Review" by disregarding the petitioner's statutory rights and granting a Motion for Summary Judgment, significantly when a jury trial has been demanded?

2. The Seventh, Eighth and Ninth Circuit Courts ruled on several "issues" (Hostile Environment, Substantive Law, Performance Reviews, Weighing Credibility) that they must go to the "Jury for Consideration" while the Second Circuit Court of Appeals does not recognize these "issues" for Jury Consideration clearly, this is Unconstitutional. Will the Supreme Court set Precedent that these "issues" no matter where a litigant resides in the United States of America must go to a "Jury" for consideration?

3. Does the *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 798, 93 S. Ct. 1917 36 L. Ed. 2d 668 (1973) burden shifting Methodology Conflict with the "intent" of *The Civil Rights Act of 1991*, Pub. L. 102-66, 105 Stat. 1071?

4. Was the Second Circuit "obligated" to apply the new retaliation precedent the Supreme Court mandated in *Burlington Northern & Santa Fe Railway Co. v. White,* 126 S. Ct. 2405 (2006)?

QUESTIONS PRESENTED – Continued

5. Without Precedent *Pro-se* Civil Rights Employment discrimination "State of mind" and "Intent" cases where Summary Judgment is "ordinarily inappropriate" and "sparingly" used the courts will abuse its power. Will the Supreme Court set Precedent to stop this "injustice"?

PARTIES

The parties to the proceedings before the Southern District Court of New York and the Second Circuit Court of Appeals were Petitioner Robert Williams *Pro-se* and Respondent Home Depot U.S.A., Inc. ("Home Depot") represented by Law Firm Morgan Lewis and Bockius.

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OPINIONS BELOW

The Southern District Court has not published this case. The Second Circuit Court of Appeals also has not published this case. Pet. App. 1.

JURISDICTION

The Petitioner filed this case in the Southern District Court of New York on July 12, 2002. The District Court dismissed the Case on September 29, 2005. Pet. App. 34. The Petitioner filed an appeal with the Second Circuit on March 28, 2006. The Second Circuit denied the appeal on September 19, 2006. Pet. App. 1. The Petitioner filed for a rehearing on October 3, 2006. The Second Circuit denied the petition for rehearing on January 23, 2007. Pet. App. 35. The Supreme Court has Jurisdiction 28 U.S.C. § 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. **U.S. CONSTITUTION: SEVENTH AMENDMENT** – The Seventh Amendment (1791) to the CONSTITUTION OF THE UNITED STATES guarantees trial by jury in civil actions in the federal courts where the amount in controversy exceeds $20. It applies only to suits where a right to trial by jury existed under the English common law as of 1791 – primarily suits for money damages. One of the purposes of the amendment was to preserve the traditional distinction between the judge, who is to resolve issues of law, and the jury, which is to resolve issues of fact.

   The Seventh Amendment (7th) guarantees a Right to trial by Jury. "The Seventh Amendment does apply to

actions enforcing Statutory Rights and requires a Jury trial upon demand, if the Statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." This guarantee applies in the Courts that sit under the Authority of the United States.

2. **U.S. CONSTITUTION: FOURTEENTH AMENDMENT – Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection** – All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

   The Fourteenth Amendment "Equal Protection of all laws clause" "deny any person within its Jurisdiction the Equal Protection of all laws."

3. Federal Law – "Self-Representation."

4. **Title VII of the Civil Rights Act of 1964** – *Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. The Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) amends several sections of Title VII. These amendments appear in boldface type. In addition, section 102 of the CRA (which is printed elsewhere in this publication) amends the Revised Statutes by adding a new section following section 1977 (42 U.S.C. 1981), to provide for*

the recovery of compensatory and punitive damages in cases of intentional violations of Title VII (voluminous).

The Civil Rights Act of 1964 as amended in 1991 allows the Right to a Jury trial, and forbids "Business Necessity" defense for "Intentional Discrimination." 1991 Amendments (Pub. L. 102-166) (CRA) (all) however significantly Sec. 2000e-2 (Section 703).

STATEMENT OF THE CASE

This case reaches the Supreme Court of the United States of America seeking "Equal Justice Under Law." The Courts in question have far departed from the Constitution, established Civil Rights (Due Process) and (Freedom From Discrimination). The Courts in question departed from the accepted and usual judicial proceedings including Rule 56 of the Federal Rules of Civil Procedure (Summary Judgment Standard of Review). The Courts designed to protect the Petitioner's statutory rights became the *undoing* of the Petitioner's statutory rights.

The Petitioner litigating *Pro-se* demanded a Jury trial. The Petitioner filed this case against Respondent Home Depot U.S.A., Inc. ("Home Depot") pursuant to Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq. ("Title VII") claiming Home Depot discriminated against the Petitioner based on his race by Subjection to Unequal Terms and Conditions of employment by retaliating for Complaining of Unlawful Conduct and then terminating the Petitioner. Home Depot moved for Summary Judgment pursuant to Rule 56 of the Federal Rules and Civil Procedures. The District Court

granted Home Depot's Motion for Summary Judgment. Pet. App. 4.[1]

The Petitioner appealed to the Second Circuit Court of Appeals and presented the following issues for review: (1) Seventh Amendment Right to a Jury Trial; (2) Civil Right to a Jury Trial; (3) District Court applied substantive law incorrectly; (4) District Court disregarded evidence; (5) District Court did not address systematic abandonment of internal policies; (6) District Court weighed credibility for the Respondent; and (7) District Court failed to view *Pro-se* case in a liberally construed manner. Additionally, within several of the issues the Petitioner brought to the attention that the Seventh, Eighth and Ninth Circuit Courts of Appeals have ruled "must go to trial for consideration." The Second Circuit is in Conflict with the Seventh, Eighth and Ninth Circuits presenting an "Unconstitutional" problem. Notwithstanding, the Second Circuit affirmed the District Court's decision with a summary order. Pet. App. 2, 3.[2]

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[1] The Southern District Court of New York grants Summary Judgment on a Civil Rights Case that "state of mind" is in question. The Seventh Amendment preserves the "Right to a Jury Trial" when demanded. The Fourteenth Amendment Equal Protection Clause of all laws and the "Standard of Review" for Summary Judgment all have been overlooked rendering "Unconstitutional Injustice."

[2] The Second Circuit's Summary Order Conclusion is in clear Contradiction of the Seventh and Fourteenth Amendments and the "accepted Judicial proceedings." The Judge(s) apply the law during the Summary Judgment phase of litigation, facts are to be decided by a Jury. Moreover, Preponderance of Evidence (more likely than not) establishes civil cases. "In this Court" means we are deciding litigation on our own terms departing from the Statutory Rights of the Petitioner. Pet. App. 2, 3.

The Petitioner petitioned for a rehearing requesting the Second Circuit to reconsider its position. The Petitioner brought to the attention of the Court how its Conclusion was "fundamentally" flawed and lacked "intelligence." The Second Circuit had allowed "Judicial Misconduct" to offset their "Intellect" and "Wisdom." The Second Circuit was alerted that their Conclusion was an "Abuse" and "misuse" of power. Their Conclusion "esoterically" applies that there is "Sufficient Evidence" for trial, they have not ruled there is no "Sufficient Evidence" for trial. Pet. App. 3. This conclusion is not law! This is an "Unproveable Prediction" that can or cannot be proven without a "Jury Trial." This Conclusion from the Second Circuit and the District Court departs from the Civilized "Equal Justice Under Law." Their Conclusions stray to a "barbarous" system.[3]

The Second Circuit denied the petition for rehearing on January 23, 2007. Pet. App. 36.

Overall, the Petitioner established "Intentional Discrimination" (Directly and Indirectly), Business Necessity cannot be used for a defense for "Intentional Discrimination." *See* the Civil Rights Act of 1991 (Pub. L. 102-166) Sec. 2000e-2 (Section 703). The Petitioner has established "Sufficient Evidence" for the "Retaliation" cause of action. *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). The Second Circuit never

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[3] Summary Orders on *Pro-se* cases allow "injustice" to flourish. The Courts in question abused, misused, protected the District Court's indiscretion, sacrificed the Petitioner's statutory rights, Court Rules and procedures became *meaningless*. Keeping the *Pro-se* litigant out of the Court Room at this Judicial level is Unconstitutional. If the Petitioner was represented by Counsel the Courts in question would have *never* disregarded the statutory rights of the Petitioner.

imposed the New Precedent. The Petitioner presented "issues" the Seventh, Eighth, and Ninth Circuits acknowledge that a jury must decide the matter, not the Judge. The Summary Judgment Standard of Review states the Courts must draw all permissible factual inferences to the "non-movant." *Terry v. Ashcroft*, (Pet. App. 3), *also General Elec. Co. v. New York State Dept. of Labor*, (Pet. App. 12), *also Richardson v. New York State Dept. of Correctional Serv.* Pet. App. 12. The Courts in question disregarded the accepted "Inferences" to the "non-movant."

The Petitioner now seeks "justice" from an "impartial" Court of Law, the ultimate "check" and "balance" that enforces "Equal Justice Under the Law."

ARGUMENT

INTRODUCTION

"The party seeking Summary Judgment has the burden to demonstrate that no genuine issues of material fact exists. . . . In determining whether a genuine fact exists, a Court must draw all inferences in favor of, the non-movant . . . stated more succinctly, 'the evidence of the non-movant is to be believed.'"[4] *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 253-54 (2nd Cir. 2002) (Citations omitted). *See also Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2nd Cir. 2004); *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2nd Cir.

[4] Please bear in mind the District Court clearly departed from this accepted Judicial proceedings, and puts "energy" in to believing everything the Respondent stated disregarding all of the Petitioner's evidence before the Court. Pet. App. 12-34.

2003); *Hayut v. State Univ. of New York*, 352 F.3d 733, 743 (2nd Cir. 2003); *Sologub v. City of New York*, 202 F.3d 175, 178 (2nd Cir. 2000).

In Employment Discrimination Cases that involve Civil Rights where "Intent" and "State of Mind" is in question, such as this one, Summary Judgment is "ordinarily inappropriate." *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2nd Cir. 2000). Moreover, in discrimination cases

> Summary Judgment may not be granted simply because the Court believes that plaintiff will be unable to meet his or her burden of persuasion at trial. There must be either lack of evidence in support of the plaintiff's position, or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error.

Danzer v. Norden Sys., Inc., 151 F.3d 50, 54 (2nd Cir. 1998). Please bear in mind that the Second Circuit's Summary order is in clear contradiction of this criteria. Pet. App. 2, 3. Summary Judgment is "sparingly" used and *Pro-se* cases must be liberally construed. *Weixel v. Board of Educ. of N.Y.*, 287 F.3d 138, 145-46 (2nd Cir. 2002), *also Graham v. Long Island R.R.* Pet. App. 16.

However, when a Court decides to "open the door" on "State of Mind" Civil Rights litigation, the power to decide the case takes on the power to decide the case wrongly during the Summary Judgment phase of litigation; without a Stop Light (precedent) the Court is in a position of violating the statutory rights of *Pro-se* litigants who are not trained and/or sophisticated in law. Equal protection of all laws, the right to trial, due Process and Rule 56 of the Federal Rules

of Civil Procedure become vulnerable.[5] "Irrational" logic, "irrational" wisdom, "irrational" interpretation of "what happened" without the support of evidence, "irrational" interpretation of the law to support the Court's position become Justified disregarding the statutory rights of the *Pro-se* litigant. There has to be a precedent for the Court not to trample on the *Pro-se* litigant's statutory rights once "Sufficient Evidence" is established and once the Court has to protect the *Pro-se* litigant's right to trial within the accepted and usual Judicial proceedings with Civil Rights "State of Mind" cases. **"Once the Court chooses to ignore" Summary Judgment is "ordinarily inappropriate" in cases such as this. It puts the Court in the position of deciding "facts" which are to be determined at trial. This is Unconstitutional. The protection of "Rights to trial" has become a lottery, you win if the Court abides by Summary Judgment if "sparingly" used and "ordinarily inappropriate"; you lose if the Court does not.[6] This practice of not allowing *Pro-se* cases that have "Sufficient Evidence" for trial is Unconstitutional.**

Intentional Discrimination

The Courts use the accepted Burden shifting methodology to determine disparate treatment (unequal terms).

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[5] Federal law allows one to represent oneself in Court. This includes trial, not just up to the Summary Judgment phase of litigation.

[6] "Sparingly" and "ordinarily inappropriate" is Constitutional, it's in "harmony" with the rules of the Court and it's in "harmony" with the Statutory Rights of the citizens of the public. The Courts in question give lip service about "sparingly" and "ordinarily inappropriate." If the Court can grant Summary Judgment when "Intentional Discrimination," both directly and indirectly is established, what happens to *Pro-se* litigants who have the bare minimum "Sufficient evidence" for trial?

McDonnell Douglass Corp. v. Green, 411 U.S. 792, 798, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Pet. App. 16. The four prongs are (1) a member of the protected class; (2) the person is qualified for position; (3) the person suffered an adverse employment action; and (4) similar situated employee was treated more favorably (non-minority). These four prongs for Unequal terms are "accepted" within the usual Judicial proceedings. In other words, once the plaintiff meets the four prongs "Intentional Discrimination" has been established. (Within these four prongs there is no "clause" for the Court to add additional interpretations and raise the threshold significantly for *Pro-se* litigants). As the court admits the (fourth) prong is a factual issue. "Whether two employees" are similar situated "is a factual issue that should be submitted to the Jury." *Harlen Assocs. v. Inc. Vill. of Minneola*, 273 F.3d 494, 499 n.2 (2nd Cir. 2001) Pet. App. 21.

The Court admits the Petitioner met all four prongs. However, the Court added on "illogical considered ideology" (Pet. App. 19-22) which clearly offsets a Court philosophy that Summary Judgment is "sparingly" , and "ordinarily inappropriate" in "State of Mind" Civil Rights cases. The Court boldly states "while plaintiff may have been singled out and treated differently in one instance than his white co-worker, there is no indication that the treatment was based on racial discrimination." According to the American Heritage Dictionary (4th edition) Discrimination means to make a clear distinction, differentiate. Please Note: There is no "magical" number that one must be treated differently to reach the threshold of discrimination. This is what happens when the Court "opens the door" and tries to decide "State of Mind" cases during Summary Judgment. They insert "irrational"

ideology, "irrational" logic, "irrational" wisdom all in the support of the Respondent departing from the rules of the Court and the Statutory Rights of the *Pro-se* litigants. Judges apply the law, facts are for a bench or jury trial. These actions by the Court are in clear "opposition" of a Court being sensitive to the statutory rights and the "ordinarily inappropriate" and "sparingly" used in "State of Mind" Civil Rights cases. Their actions speak of keeping the *Pro-se* litigant out of the Court Room.[7] The Petitioner does not have to show that all "African-Americans" were discriminated against. The *McDonnell Douglass* unequal terms methodology is designed to test for individual discrimination. This is accepted within the Judicial proceedings. Pet. App. 22. Once "Intentional Discrimination" has been established the Civil Rights Act of 1991 (as amended) does not allow any defense. *See* Civil Rights Act 1991 (Pub. L. 102-166) Sec. 2000e-2 (Section 703).

Additionally, the Petitioner presented evidence of Direct "Intentional Discrimination." The Petitioner produced a document (that is in the record) that shows the Assistant Store Manager (ASM) signing off as the Store Manager (SM) on the reduction in force worksheet, e.g., the Assistant Store Manager crossed out the letter (A) ASM to reflect SM. The Court ignored the "material" evidence that overwhelmingly puts this Civil Rights "State of Mind" case in front of a Jury. (*See* footnote 4, Pet. App. 29-30). The Court also states the same conclusion with the document refuting the non-discriminatory rationale from the

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[7] The Petitioner hopes the Supreme Court considers if a Court can do this when a *Pro-se* litigant presents a strong employment discrimination Civil Rights "State of Mind" case. How many *Pro-se* litigants are being undeservedly denied their statutory right?

Respondent: "material" evidence that puts this case in front of Jury. (*See* footnote 4, Pet. App. 29-30). The Court systematically does everything possible to keep the Petitioner out of the Court Room.[8]

Courts in Conflict

The Petitioner appealed to the Second Circuit presenting several issues that the Seventh, Eighth and Ninth Circuits have ruled on the same issues, " . . . must go to trial for consideration." Clearly presenting an "Unconstitutional" scenario. The Petitioner appealed claiming the Petitioner had a Seventh Amendment Right to a Jury trial; the Petitioner had a Civil Right to a Jury trial (*See* Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, grants certain Title VII claimants, the right to trials by jury); and the Petitioner appealed that the District Court applied Substantive Law incorrectly "while in *every* performance review plaintiff received at Home Depot, including those immediately following incidents of disciplinary action. Plaintiff was rated three out of five, which signifies "Solid Performance" and indicates that plaintiff "meets job expectations." "It can not be said that plaintiff necessarily met the employer's performance criteria." Pet. App. 26. Again the Judge departs from the "accepted" Judicial proceedings that the Second Circuit admits in its Summary Order that " . . . the Court is required to resolve

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[8] The Court in question is exploiting a loophole that allows them to grant Summary Judgment on *Pro-se* Civil Rights "State of Mind" cases. If the Supreme Court does not intervene, this will continue to happen. There must be precedent to stop the institution designed to protect all citizens from "irrationally" practicing unconstitutional behavior. Summary Orders also must not be allowed on "Competent" *Pro-se* cases.

all ambiguities and draw all factual inferences in favor of the party against whom Summary Judgment is sought." *Terry v. Ashcroft* (Pet. App. 3). Notwithstanding, the Ninth Circuit states: "Inferences must be drawn in the light most favorable to the non-moving party." *Lindahl v. Air France*, 930 F. 2d 1434, 1437 (9th Cir. 1991). The granting of Summary Judgment puts the Second Circuit in conflict. The Petitioner pointed out that the District Court departed from the "accepted" Judicial proceedings about the matter that the Court does not

> weigh disputed evidence with the respect to disputed evidence, nor does the Judge make credibility determinations with regards to statements made in affidavits, answers to interrogatories, admissions or depositions. These determinations are within the province of the fact finder at trial, disputes about material facts and credibility must be resolved at trial, not on Summary Judgment.

T.W. Electric Services, Inc. v. Pac. Elec. Contractors, Ass'n, 809 F.2d 630, 631 (9th Cir. 1987).

The Petitioner also brought to the attention of the Second Circuit that the Supreme Court ruled that plaintiffs can use acts outside the time frame to support a hostile environment claim. The Court must consider these acts. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). The Seventh Circuit has ruled on the "Hostile Environment" issue that "to be actionable, harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806-07 (7th Cir. 2000).

"Whether the harassment rises to the level turns on a Constellation of factors that include the frequency of the

discriminatory conduct; its severity; whether it is physically threatening or humiliating and whether it interferes with an employee's work performance." *Hostetler*, 218 F.3d at 806-07. "A plaintiff bringing a hostile environment claim must establish that the workplace was both subjectively and objectively offensive. *Rogers v. City of Chicago*, 320 F.3d 748, 752 (7th Cir. 2003). "A workplace is objectively offensive when a reasonable person would find it hostile or abusive considering all of the Circumstances." *Rogers*, 320 F.3d at 752, *Hostetler*, 218 F.3d at 807. "*It is subjectively hostile when the plaintiff actually perceives it as such.*" "A relentless pattern of lesser harassments that extends over a period of time violates the statute." The Second Circuit believes that a plaintiff must have suffered "detrimental" acts to survive a hostile environment claim which is in clear contradiction with the Seventh Circuit. The Second Circuit's standard is not in tune with the nature of a hostile environment Claim. Pet. App. 14, 15. The Petitioner appealed to the Second Circuit that the District Court disregarded Appellant's evidence. (Footnote 4, Pet. App. 29-30). Disregarding of evidence puts the Court in Conflict with all Courts. The Petitioner appealed to the Second Circuit that the District Court failed to address the "Systematic Abandonment" of Internal Termination policies. The Respondent's Code of Conduct categorized the Petitioner's "incidents": as minor work violations which activate a (1) coaching session; (2) counseling session; (3) final counseling session; (4) termination session. The Respondent produced no documentation of any of these sessions and the Petitioner never received a "negative" performance review. The Petitioner brought to the attention that the "reduction in force" worksheet requires three signatures: (1) the Store Manager; (2) the Department Manager; and (3) the Human Resources Manager. (These signatures implement the checks and

balances for termination. All signatures were "abandoned." This abandonment, along with the Assistant Store Manager signing the document, as if he were the "Store Manager," are triable issues "Sufficient Evidence" to put this case in front of a Jury. As the Eighth Circuit states, "the Systematic abandonment of Company policies creates a triable issue. Discharged pursuant to an inconsistent policy." *Floyd v. Mo. Dept. of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999). (Please note falsifying company documents are major work violations in the Respondent's Code of Conduct)." The Petitioner appealed that the District Court weighed the credibility for the Respondent "the Court finds that plaintiff failed to meet defendant's performance criteria to be qualified for position and thus fails to satisfy the job qualification prong of the prima facie case." Pet. App. 26. However, the evidence shows the appellant performed solid performance – meets job expectations.[9] The Seventh Circuit has ruled, "once the employee has cast doubt upon the employer's pro-offered reasons for termination, the issue of whether the employer's pro-offered reasons for termination; the issue of whether discriminated against the plaintiff is to be determined by the Jury **NOT** the Court. *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 681-82 (7th Cir. 1996). In order to Survive Summary Judgment, an employee need only "produce evidence from which a rational fact finder could infer that the Company lied about its pro-offered reasons for dismissal." *Courtney v. Biosound, Inc.*,

[9] Again, for a standard that Summary Judgment is "ordinarily inappropriate" and "sparingly" used in Civil Rights "State of Mind" cases, the Courts in question go over and beyond the necessary "Standard of Review" to keep the *Pro-se* litigant out of the Court Room departing from the "accepted" Judicial proceedings and Statutory Rights of the Petitioner.

42 F.3d 414, 424 (7th Cir. 1994). In other words, "If there is a question of fact as to the believability of an employer's purported reasons for an employment decision," then "even if the evidence presented by the plaintiff does not compel the conclusion that the employer discriminated against plaintiff when making the decision, at a bare minimum, it suffices to defeat the employer's summary judgment motion." *Biosound*, 42 F.3d at 423 (7th Cir. 1994). Additionally, if there are issues of fact with regard to either evidence of negative performance reviews (disciplinary reviews) or discriminatory behavior, then the determination of the disputed facts must go to a Jury. *Taybron v. City and County of San Francisco*, F.3d 957, 959 n.2 (9th Cir. 2003); The Petitioner also appealed to the Second Circuit that District Court failed to view the case in a liberally construed manner "plaintiff's proceeding *Pro-se* particularly in cases involving Civil Rights allegations deserve special latitude on Summary Judgment Motions and their submissions ... must be liberally construed." Pet. App. 12. As stated previously, the Court in question "abandoned" this "accepted" judicial proceeding "protecting *Pro-se* litigant's Civil Rights." The Petitioner alerted the Second Circuit that "State of Mind" Civil Rights Cases are not to be determined on Summary Judgment Motions, once you "open the door" on "State of Mind" *Pro-se* litigation, the Court abuses and exceeds its discretion and makes "errors of law." *United States v. Ebersole*, 411 F.3d 517, 526-27 (4th Cir. 2005).

Civil Rights Act (1991)

The *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 798, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (l973). Burden Shifting Methodology is in Conflict with the "intent" of Congress Title VII of the Civil Rights Act 1991 Amendments. The

Amendments allow a right to a jury trial, and disallow the defense of "Business Necessity" for intentional discrimination. Moreover, the intent from Congress states,

> An employer will be held liable for discrimination if the employee can prove the employer's "discriminatory" reason was a "motive" in the employment decision even if the non-discriminatory motives played a part in the employer's decision making procress. In short, any employment decision infected with even the slightest discriminatory motive, would constitute a violation of Title VII, even if the employer would have made the same employment had it not considered the employee's race, sex, etc. Any employment decision which considers race, sex, etc. to any degree is Unlawful Under the Civil Rights Act of 1991.

This is what Congress intended for the 1991 Amendment. The Civil Rights Act of 1991, Pub. L. 102-66, 105 Stat. 1071.[10] The *McDonnell Douglass* is not in harmony with the 1991 Civil Rights Amendments. The *McDonnell Douglass* contradicts, "State of Mind" Civil Rights cases and allows different courts the power to interpret "situations" in a manner that creates Unconstitutional results *e.g.*, one Circuit Court views a "situation" as lawful whereas another Circuit Court views the same "situation" as Unlawful. If a Petitioner lives in one area of the country, they go to trial, whereas if the Petitioner lives in

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[10] When a reduction in force has 10 people for termination and 9 are minorities (8) blacks, (1) Hispanic and (1) White, within the intent of Congress 1991 Civil Rights Amendments, this is in violation of the act. (Triable issue) Any employment decision that considers race, sex, etc. to any degree is unlawful. The Court disregarded this evidence. Pet. App. 27.

another area, their case is dismissed on Summary Judgment. Without Precedent the Courts will not stop granting Summary Judgment Undeservedly. The Supreme Court knows that Discrimination can be administered. Covertly, *McDonnell Douglass'* burden shifting can not surface covert discrimination which contradicts the Civil Rights 1991 Amendments. The Supreme Court ruled in *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 143, 120 S. Ct. 1097, 147 L. Ed. 2d 105 (2000), to eliminate the Pretext-Plus Burden, offering the solution that agrees with the intent of Congress' 1991 Civil Rights Act (Amendments). Pet. App. 17, 18. The burden shifting *Douglass* methodology is in contrast to Summary Judgment is "ordinarily inappropriate" and "sparingly used" concerning the "Mind State" of an employer. Facts are to be determined at trial – the burden shifting eliminates trial. When the Court fails to stop once "sufficient evidence" surfaces. When the Court goes to the burden shifting formula they are moving to see if they can find an avenue that will justify dismissing a *Pro-se* litigant's case on Summary Judgment when Summary Judgment is "sparingly" and "ordinarily inappropriate" on Civil Rights cases. I would like to see a *Pro-se* Civil Right "State of Mind" case where the Judge denies Summary Judgment on the grounds that the litigant has a right to trial and Summary Judgment is "sparingly" used and "Ordinarily inappropriate."

If the Petitioner lived within the Jurisdiction of the Seventh, Eighth and Ninth Circuit Courts, the case would have gone to trial. Clearly this is unconstitutional. The Seventh, Eighth and Ninth Circuit Courts are within the "Intent" of Congress Civil Rights Act of 1964 as amended in 1991.

Retaliation

On June 2006, the Supreme Court Unified the "Courts" within the intent of "Retaliation" claims from Congress. The Supreme Court noticed that there was "confusion" interpreting the language causing conflict within the Judicial System which is Unconstitutional.[11] The Supreme Court established "new precedent" that the Second Circuit never applied to the Petitioner's case. The Petitioner filed his appeal on March 28, 2006 (roughly 3 months before the Supreme Court's new retaliation precedent). The Appealed Court ruled on this case September 19, 2006. Pet. App. 1. The Second Circuit was "obligated" to apply the new precedent. The courts continue to depart from the "accepted" judicial proceedings, *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 240 (2006). However, the Petitioner appealed to the Second Circuit that the "opposition clause" extends Protected Activity as long as the employee believed the employer's conduct violated Title VII. (Please note the Petitioner produced evidence complaining of "harassment/bias." The Court ignored the bias part of the complaint.) Pet. App. 33. Notwithstanding, in *Peterson v. Scott County*, 406 F.3d 515, 520 (8th Cir. 2005) states: "Protected Activity also . . . opposition clause "oppose" employment practices that are unlawfully but also includes opposition to practices that are not unlawful, as long as the employee acted in good faith object, objectionable reasonable belief that the

[11] The same Unconstitutional Scenario is present with the language interpretation concerning "employment discrimination" among the Courts. If the Petitioner lived within the Jurisdiction of the Seventh, Eighth and Ninth Circuit Courts, the Petitioner goes to trial on the issues. However, since the Second Circuit has their own "interpretations" the Petitioner's case is dismissed. This is unconstitutional.

practices were unlawful." *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998); *Evans v. Kansas City, Mo. School District*, 65 F.3d 98, 100 (8th Cir. 1995). The Eighth Circuit intended to make the broader protection "consistent" with the true intent of Congress and "necessary" to further the central purpose of Title VII. *Berg v. Lacrosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980). The Supreme Court recently noted this interpretation *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001).

Without Precedent

The Supreme Court has been put on notice once the Court "opens the door" on *Pro-se* Civil Rights Cases involving "State of Mind." The Court has to have "precedent" that does not allow the statutory rights of *Pro-se* litigants to be "disregarded" by the very institution designed to "Protect" the litigant's statutory rights. This case has shown the "abuse" the Courts can apply to *Pro-se* litigants. This case has shown "egregious" Judicial Conduct that relies on Summary Judgment is "ordinarily inappropriate" and "sparingly" used in Civil Rights cases. Without a precedent that stops the Court from overlooking "Sufficient Evidence" and trying to become "fact finder" during the Summary Judgment Phase of litigation, the statutory right of *Pro-se* litigants will continue to be "sacrificed."[12] Pet. App. 1-3 and 12-36.

[12] There has to be precedent to stop the Courts from "abusing" Judicial Proceedings with *Pro-se* litigants. Summary orders have to be eliminated on "competent" *Pro-se* claims. Summary orders allow the Court to not take the *Pro-se* litigant "seriously."

Reasons for Granting the Petition

The Supreme Court of the United States of America protects and enforces "Equal Justice Under Law." The Petitioner humbly seeks the help of the Highest Court in the land.

The Supreme Court's nature of review considers United States Court of Appeals decisions that are in conflict with another United States Court of Appeals on the same "important matter." The Supreme Court considers if courts have "far departed from the accepted and usual course of judicial proceedings," the Supreme Court considers the "importance to the public of the issue." This case "fits" the nature of review on all three (3) criteria the Supreme Court of the United States of America seek out.

The Supreme Court has been "alerted" that there is a problem within the Courts in question. The Supreme Court has been alerted that the Judicial System designed to protect "citizens" statutory rights are not respecting the Constitution, Civil Rights and Court Rules. This is Unconstitutional.

Pro-se litigants are being "herded" and kept out of the Court Room. The Supreme Court must ask consciously how many *Pro-se* litigants have been denied their statutory rights by the Court in question? And how many will be denied their statutory rights if the Supreme Court does not intervene?[13]

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[13] Smaller courts handle and respect *Pro-se* litigants. For the federal courts to assume that their Court Room will be flooded with *Pro-se* litigants is irrational and unconstitutional. Only 4% of Civil Cases go to trial, the rest are settled. This statistic would not change. In fact it would go a long way to curb discrimination.

As children, we are taught how the Constitution guarantees its citizens statutory rights that the government enforce. The Seventh Amendment grants "A Right to Trial, if demanded," the Fourteenth Amendment grants "Equal Protection of All Laws."

The Supreme Court must ask if the Petitioner had legal counsel ("lawyer") would this case have been dismissed when "sufficient evidence" has been established?

Employment Discrimination Civil Right Cases that involve "State of Mind" and "Intent" that the Court's state summary judgment is "ordinarily inappropriate" and "sparingly" used is Unconstitutional. The Courts enforce law. The law cannot have "flexibility" because you will have citizens being denied their statutory right by the Court System. Either you do not grant Summary Judgment on Civil Rights "State of Mind" and "Intent" cases or you do. The fact that there is a choice does not represent "law."

Does "ordinarily inappropriate" and "sparingly" used translate to "appropriate" and "used" for *Pro-se* litigants, this is what the evidence of this case supports.

Statutory Rights must have a "standard" that does not depend on a choice by the Court. Testing a "State of Mind" and "Intent" Civil Rights case with a methodology that uses a formula (*McDonnell Douglass*) when Statutory Rights are in question is Unconstitutional and is not in harmony with the intent of the Civil Rights Act of 1991. No other "State of Mind" case uses a formula. Notwithstanding, this formula does not detect "covert" discrimination.

"Equal Justice Under Law" cannot thrive when a Court violates a *Pro-se* litigant's "Statutory Rights." "Equal Justice Under Law" cannot depend on a "formula"

that cannot detect "overt" and "covert" discrimination. (*McDonnell Douglass*). "Equal Justice Under Law" can not depend on "ordinarily inappropriate" and "sparingly" used with "State of Mind" and "intent" Civil Rights cases (either it's used or not used). "Equal Justice Under Law" cannot "belittle" *Pro-se* litigants and disregard their statutory rights. "Equal Justice Under Law" is a system that is unified and applied equally, no matter where one resides in the United States of America.

Without Precedent that stops the Courts from allowing "Summary Orders" and courts from granting Summary Judgment once "Sufficient Evidence" is established with *Pro-se* litigants. "Equal Justice Under Law" is not guaranteed to *Pro-se* litigants.

Many petition to the Supreme Court and at least they had their trial. However, this Petitioner did not have a trial and for that reason, "Equal Justice Under Law" has been denied to the Petitioner. The Petitioner does not petition the Supreme Court with a "tad" of injustice; the Petitioner petitions the Supreme Court with "gross" injustice that's bigger than the Petitioner. There is at least a "demographic" of litigants being denied their Statutory Rights; the Supreme Court has been put on "notice." As stated previously, if the Court can grant Summary Judgment when a *Pro-se* litigant has established "Intentional Discrimination" (directly and indirectly) and has presented several "triable" issues to establish "Sufficient Evidence" of facts, when Civil Rights "State of Mind" and "Intent" are in question, what is being done to *Pro-se* litigants who produce the bare minimum "Sufficient Evidence" to survive Summary Judgment?

The Petitioner needs the help of an "impartial" court of law, that happens to be the highest Court in the land, "The Supreme Court of the United States of America."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT WILLIAMS, *Pro-se*
1424 Oakley
Bronx, New York 10469
718-547-6098

April 20, 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Sep. 19, 2006)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of September two thousand six.

PRESENT:

HON. ROGER J. MINER,
HON. JOSEPH M. McLAUGHLIN,
HON. ROBERT A. KATZMANN,

Circuit Judges.

Robert Williams,

Plaintiff-Appellant,

v. 05-6347-cv

Home Depot USA, Inc.,

Defendant-Appellee.

ROBERT WILLIAMS, Plaintiff-Appellant, *Pro se*, Bronx, N.Y.

For Defendant-Appellee: DEBRA S. MORWAY, Morgan, Lewis & Bockius LLP, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Batts, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and hereby is **AFFIRMED.**

On July 12, 2002, proceeding pro se, Plaintiff-Appellant Robert Williams filed a federal complaint alleging that Defendant-Appellee Home Depot USA, Inc. had denied Appellant an equal employment opportunity in his job as a sales associate on the basis of his race, and that Appellee had retaliated against Appellant after he had complained of harassment and discrimination, all in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The district court (Batts, J.) granted Appellee's motion for summary judgment and entered final judgment on October 4, 2005. We assume the parties' familiarity with the relevant facts and the specification of issues on appeal.

This Court reviews an order granting summary judgment *de novo*, and asks whether the district court properly concluded that there were no genuine issues of material facts and that the moving party was entitled to judgment as a matter of law. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). In determining whether there are genuine issues of material fact, this Court is "required to resolve all ambiguities and

draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003) (citation omitted). This Court will only affirm the dismissal of a claim on summary judgment if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him[to relief." *Id.*

Having considered each of Appellant's argument, we affirm the judgment of the district court for substantially the reasons given in its decision. Accordingly, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Olivia M. George
Olivia M. George,
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT WILLIAMS,

Plaintiff,

-against-

HOME DEPOT U.S.A., INC.,

Defendant.

----------X

02 Civ. 5353 (DAB)
MEMORANDUM
& ORDER

DEBORAH A. BATTS, United States District Judge.

Plaintiff Robert Williams, proceeding *pro se*, filed the above-captioned case against Defendant Home Depot U.S.A., Inc. ("Home Depot") pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000, et. seq. ("Title VII"), alleging that Defendant discriminated against him based on his race by subjecting him to unequal terms and conditions of employment, by retaliating against him for complaining of unlawful conduct, and by terminating him. Defendant moves for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated herein, Defendant's Motion for Summary Judgment is GRANTED.

I. BACKGROUND

The facts of this case from 1999 through August 2000 are largely undisputed. In 1999, Plaintiff, an African-American man, was placed by a temporary employment agency at Defendant's New Rochelle store. (Deposition of Robert Williams, December 16, 2002 and January 7, 2003 at 31 (hereinafter "Pl.'s Dep.") (parts of which are attached

to Plaintiff's Affidavit in Opposition to Defendant's Motion for Summary Judgment, and parts of which are attached to Affidavit of Debra Morway in Support of Defendant's Motion for Summary Judgment).) Plaintiff worked at the New Rochelle store on a temporary basis until August 11, 1999, when Defendant hired Plaintiff to work on a full-time basis as a sales associate, first in the millwork department and then in the building materials department. (Pl.'s Dep. at 36-37; Plaintiff's Affidavit Exhibit 41 (hereinafter "Pl.'s Aff. Ex.").) In the building materials department, Plaintiff was supervised by Andre Billups from August 1999 until around May 2000, when Billups transferred to another department and John Phelps became Plaintiff's supervisor. (Pl.'s Dep. at 38; Defendant's 56.1 Rule Statement ¶ 10 (hereinafter "Def.'s 56.1").) Both Billups and Phelps are African-American. (Def.'s 56.1 ¶ 10; Pl.'s Dep. at 33-34.)

On October 18, 1999, Plaintiff did not report to work and failed to call the store to explain his absence. (Pl.'s Dep. at 45.) Billups issued Plaintiff a written disciplinary notice for his unexcused absence and advised him on the notice that additional violations of company policy "could and will result in termination." (Def.'s 56.1 ¶ 7; Pl.'s Dep at 46.)

On October 24, 1999, Billups conducted Plaintiff's "New Associate Review" evaluation, in which Plaintiff received an overall rating of "solid performance." (Pl.'s Aff. Ex. 11.) Billups gave Plaintiff a rating of "improvement needed" in the "Willingness to Learn" and "Showing Work Commitment" categories of the evaluation and advised Plaintiff to arrive at work on time and to work more efficiently, but also noted that Plaintiff is "easy to get along with [and] intelligent." (*Id.*) On December 9, 1999,

Billups conducted a "Sales Associate Performance Appraisal" of Plaintiff's work, in which Plaintiff received an overall rating of three out of five, signifying "solid performance." (Def. Aff. Morway Ex. G.) Billups gave Plaintiff-a rating of three in all job categories except "Product, Department, and Store Knowledge," in which Plaintiff received a two, signifying "improvement needed." (*Id.* at 2.) In June 2000, Billups again assessed Plaintiff's work, giving Plaintiff a rating of three overall and in all job categories. (Pl.'s Aff. Ex. 14.)

From August 2000 to September 2001, when Plaintiff was terminated, Plaintiff received several disciplinary notices and submitted numerous complaints, many of the details of which are disputed by the parties. Between May and July of 2000, Plaintiff was absent from work on twelve occasions. (Pl.'s Dep. at 74.) According to Plaintiff, Billy Mack, then an assistant store manager, excused the absences when Plaintiff explained to him the reason he had missed work. (*Id.* at 74.) In August 2000, Plaintiff alleges that he became involved in an "incident" with his co-worker, "Mike." (*Id.* at 74-75.) Plaintiff alleges that John Phelps, his new supervisor, favored Mike over Plaintiff and sought to punish Plaintiff, but for reasons Plaintiff does not explain, Phelps did not discipline Plaintiff for the incident. (*Id.* at 77.) According to Plaintiff, Phelps instead issued Plaintiff a disciplinary notice for his twelve absences, despite the fact that the absences were allegedly excused. (*Id.*)

In response to what he perceived to be inappropriate disciplinary action amounting to harassment, on August 9, 2000, Plaintiff called Defendant's "Alert Line," a phone service that enables Home Depot employees to report harassment or disrespectful treatment. (Pl.'s Aff. Ex. 16;

Def.'s Aff. Ex. P.) According to the record of the Alert Line call, Plaintiff alleged that he had been harassed by Billups the day before. (Pl.'s Aff. Ex. 16.)

On October 13, 2000, Plaintiff was "involuntarily" transferred to the plumbing department. (Pl.'s 56.1 ¶ 13.) In an appraisal of Plaintiff's performance issued after the transfer, Phelps' overall assessment was that Plaintiff "meets expectations," but Phelps also noted that Plaintiff needed improvement in the areas of four of the nine categories, including "Stress Tolerance" and "Judgment." (Pl.'s Aff. Ex. 20.)

On January 2, 2001, Plaintiff received a disciplinary notice from William Hobart, an assistant store manager, for failing to work his scheduled shift without calling the store to give advance notice of his absence. (Pl.'s Dep. at 87-89.) Plaintiff alleges that he did call to give advance notice of his absence and that he discussed the matter with Hobart, who promised to remove the notice from his file, but failed to do so. (*Id.* at 88.)

Plaintiff received a fourth disciplinary notice on January 23, 2001, when his supervisor, Mohamed Rasheed, found that Plaintiff had left the plumbing department to assist in another department without notifying a manager. (*Id.* at 94-96.) Plaintiff alleges that no other employee in the store, was required to request permission to leave the department. (*Id.* at 111-12.) Plaintiff also claims that company rules regarding customer service require employees to walk customers to other parts of the store, and find another associate to help them. (*Id.* at 111-12.) In support of this claim, Plaintiff attaches a 1999 Home Depot Orientation Guide, which states in a section entitled, "Guidelines for Customer Service," "Don't point

customers to some other part of the store. Walk them there and find someone who can help them." (Pl.'s Aff. Ex. 8.) According to Ian Doyen, one of Plaintiff's former co-workers, who is also African-American, sales associates as a whole did not have to notify management when assisting customers in other departments, and Plaintiff was "the only sales associate [Mr. Doyen had] seen or heard of getting a disciplinary notice for assisting in another department." (Doyen Aff. at 2.) Plaintiff further alleges that also on January 23, 2001, Rasheed made an "offensive" comment to Plaintiff by stating that Plaintiff "gave a lot of problems in his former department." (Pl.'s 56.1 ¶ 16; Pl.'s Aff. Ex. 22.)

On June 3, 2001, Plaintiff's co-worker Jeff informed Rasheed that Plaintiff had left his department without requesting permission. (Def.'s 56.1 ¶ 17.) While Plaintiff alleges that Jeff was "monitoring" and "harass[ing]" Plaintiff, Defendant contends that Jeff was simply looking for Plaintiff and was unable to find him. (*Id.*; Pl.'s 56.1 ¶ 17.) According to Plaintiff, in a subsequent meeting with Assistant Store Manager Ronnie Oddo, Rasheed stated that Plaintiff "does not do any work" and that Rasheed "can never find [Plaintiff]." (Pl.'s Aff. Ex. 25.) Plaintiff responded to these events by calling the Alert Line and by submitting a written statement to Defendant in which he complained of "defamation and harassment of character." (Pl.'s Aff. Ex. 25-26.)

Plaintiff had his annual monetary review on July 1, 2001. (Pl.'s Aff. Ex. 28.) Rasheed initially wrote a negative evaluation of Plaintiff's performance based on Plaintiff's failure to request permission to leave the department. (Pl.'s Aff. Ex. 18 at 7; Pl.'s Dep. at 144.) According to Plaintiff, in discussing Rasheed's evaluation of Plaintiff,

Assistant Store Manager John Melendez and Store Manager Ray Rockensies determined that Rasheed had not sufficiently documented Plaintiff's absences in his personnel file to warrant the negative review. (Pl.'s Aff. Ex. 18 at 7.) In a second version of the July review, Rasheed gave Plaintiff an overall rating of three ("solid performance") and a rating of two ("improvement needed") under the categories of "Being a Team Player" and "Judgment." (Pl.'s Aff. Ex. 28 at 4; Def.'s Aff. Ex. L at 4.) Under the "Judgment" category, Rasheed noted that Plaintiff needed to work to prevent "discrepanc[ies]," "prioritize his task[s]." (*Id.*) Plaintiff also received a forty-cent raise in his hourly rate. (Pl.'s Aff. Ex. 27.).

Plaintiff received a fifth disciplinary notice on August 1, 2001. (Pl.'s Aff. Ex. 29.) On the evening of August 1, Assistant Store Manager Jose Chan observed Plaintiff 'punching out' twenty minutes before the end of his shift. (Pl.'s Aff. Ex. 29; Pl.'s 56.1 ¶¶ 19-21.) Plaintiff alleges that he made up for the additional minutes during his lunch break, and that it was common practice for sales associates at the Home Depot to leave early and compensate for the time by taking shortened lunch breaks. (Pl.'s 56.1 ¶ 20; Pl.'s Dep. at 157; Doyen Aff. at 2.) According to Plaintiff, when Chan told Plaintiff to work until the end of his scheduled shift, Plaintiff said "[i]f you have a problem, talk to the Store Manager." (Pl.'s 56.1 ¶ 21.) Chan gave Plaintiff a disciplinary notice for insubordination on which he wrote that Plaintiff showed a "complete disregard [for] company procedures" and that "this is cause [for] termination." (Pl.'s Aff. Ex. 29.) Plaintiff alleges that an unnamed co-worker, who was giving Plaintiff a ride, clocked out early with Plaintiff that day and was not reprimanded by Chan. (Pl.'s Dep. at 154.)

Between June and August of 2001, Defendant hired approximately thirty new employees to work during the night shift as part of the company's new program to organize store merchandise at night when the store was closed or had less customer traffic. (Def.'s 56.1 ¶ 32-33.) Defendant claims that in September 2001, after the new night crew had been hired, the New Rochelle store's management learned that the number of associate hours billed in specific departments exceeded the number of hours budgeted. (Def.'s 56.1 ¶ 27.) According to Defendant, as a result of this discrepancy and of the negative effects of the September 11, 2001 terrorist attacks on the store's revenue, management sought to cure the excess number of billed hours through a reduction in force in over-staffed departments. (Def.'s 56.1 ¶ 28.) Defendant alleges that its decision regarding which employees would be included in the reduction in force was consistent with the company's policy guidelines regarding reducing the workforce, which include reviewing an employee's performance and disciplinary record among other factors. (Weinman Aff. ¶¶ 11-12.) Plaintiff was among ten employees terminated between September 26, 2001 and September 28, 2001 as part of the reduction in force. (Def.'s 56.1 ¶¶ 30-31; Pl.'s Aff. Ex. 18 at 5.) Of these terminated employees, one was white, one was Hispanic, and eight, including Plaintiff, were black. (Pl.'s Aff. Ex. 18 at 5.)

On February 13, 2002, Plaintiff filed a complaint with the Equal Employment Opportunity Commission alleging that Defendant discriminated against him based on his race and retaliated against him for complaining about the discrimination. (Pl.'s Aff. Ex. 39; Def.'s 56.1 ¶ 36.) On June 3, 2002, the EEOC issued Plaintiff a Notice of Right to Sue. (Pl.'s Aff. Ex. 40; Def.'s 56.1 ¶ 37.)

Plaintiff initiated the present lawsuit on July 12, 2002, alleging unlawful termination, unequal terms and conditions of employment, and retaliation. On July 24, 2002, Plaintiff filed an Amended Complaint that contained the same allegations, but with modified dates as to when the alleged discriminatory conduct took place. Defendant now moves for summary judgment on the grounds that certain claims are time-barred, and that Plaintiff cannot establish a *prima facie* case or demonstrate that Defendant's alleged non-discriminatory reason for its action was pretextual. (Def.'s Mem. Law at 1.)

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. Rule 56(c). A party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and of drawing the court's attention to the materials "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party has made this minimal showing, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (quoting Rule 56(e), Fed.R.Civ.P.). For the purposes of a motion for summary judgment, a "fact is material when its resolution would affect the

outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *General Elec. Co. v. New York State Dept. of Labor,* 936 F.2d 1448, 1452 (2d Cir. 1991) (quoting *Anderson,* 477 U.S. at 248) (internal quotations omitted).

In determining whether a party is entitled to summary judgment, the court must "draw all factual inferences and resolve all ambiguities in favor of the nonmoving party." *Richardson v. New York State Dept. of Correctional Serv.,* 180 F.3d 426, 436 (2d Cir. 1999). Moreover, plaintiffs proceeding *pro se* – particularly in cases involving civil rights allegations – "deserve special latitude on summary judgment motions" and their "submissions . . . must be generously and liberally construed." *Ancekewicz v. Long Island Univ.,* No. 02 Civ. 4490, 2005 U.S. Dist. LEXIS 11662, 2005 WL 1411917, at *4 (E.D.N.Y. June 15, 2005) (citations and quotations omitted); *see also Weixel v. Board of Educ. of N.Y.,* 287 F.3d 138, 145-46 (2d Cir. 2002). Nonetheless, "a pro se party's 'bald assertion,' completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Odom v. Keane,* No. 95 Civ. 9941, 1997 U.S. Dist. LEXIS 14077, 1997 WL 576088, at *3 (S.D.N.Y. Sept. 17, 1997) (quoting *Carey v. Crescenzi,* 923 F.2d 18, 21 (2d Cir: 1991)). The non-movant may not rely on "the mere existence of a scintilla of evidence" to support its position, but must instead come forward with "evidence on which the jury could reasonably find for the [plaintiffs]." *Dawson v. County of Westchester,* 373 F.3d 265, 272 (2d Cir. 2004) (quoting *Anderson,* 477 U.S. at 252).

B. Timeliness

A party seeking to pursue a Title VII claim in federal court must first file a complaint with the EEOC within the period set forth in 42 U.S.C. § 2000e-5(e) and obtain from the EEOC a "right to sue" letter. *See Legnani v. Alitalia Linee Aeree Italiane, S.P.A.,* 274 F.3d 683, 686 (2d Cir. 2001). The statutory filing period is 300 days in states in which a state or local agency with authority to seek relief for employment discrimination claims has a work-sharing agreement with the EEOC. *See Tewksbury v. Ottaway Newspapers, Inc.,* 192 F.3d. 322, 327 (2d Cir. 1999). The New York State Division of Human Rights ("NYSDHR") is authorized to seek relief from illegal employment practices, and the NYSDHR and the EEOC have a work-sharing arrangement that permits each agency to receive charges on behalf of the other. *See Tewksbury,* 192 F.3d at 324; *Francis v. Blaikie Group,* 372 F.Supp.2d 741, 746 (S.D.N.Y. 2005). As such, parties filing complaints with either the EEOC in New York or the NYSDHR must do so within 300 days of the alleged unlawful employment practice.

The filing period set forth in 42 U.S.C. § 2000e-5(e) "is analogous to a statute of limitations," and a party who fails to file a complaint with the EEOC or deferral-state agency within 300 days of the discriminatory employment practice is time-barred from bringing suit. *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 712 (2d Cir. 1996). As the Supreme Court made clear in *AMTRAK v. Morgan,* the statute's reference to an "unlawful employment practice" refers primarily to "discrete act[s] or . . . occurrence[s]" that must take place within the statutory filing period. 536 U.S. 101, 111 (2002). Such "discrete acts that fall within the statutory time period do not make

timely acts that fall outside the time period." *Id.* at 112. Thus, while an aggrieved party may reference conduct outside the 300-day filing period "as background evidence in support of a timely claim," the allegedly unlawful conduct for which the party seeks relief must have occurred within the filing period. *Id.* at 113.

In the instant case, Plaintiff filed a complaint with the EEOC on February 13, 2002 and argues that Defendant's allegedly unlawful conduct that falls outside the 300-day filing period is not time-barred because his workplace constituted a hostile work environment. (Pl.'s Mem. Law at 17.) In Morgan, the Supreme Court held that an aggrieved party may bring a hostile work environment claim for conduct that occurred outside the statute of limitations so long as at least one act contributing to the hostile environment occurred within the statutory period. *Morgan,* 536 U.S. at 117.

"Title VII does not authorize a hostile work environment claim for conduct that was merely offensive." *Fitzgerald v. Henderson,* 251 F.3d 345, 356-357 (2d Cir. 2001). Rather, "[i]n order to survive summary judgment on a claim of hostile work environment harassment, a plaintiff must produce evidence that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 570 (2d Cir. 2000) (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)) (internal quotations omitted). Such conditions must "create an objectively hostile or abusive work environment." *Gregory v. Daly,* 243 F.3d 687, 691 (2d Cir. 2001) (quoting *Harris,* 510 U.S. at 21). The plaintiff must

"demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her working environment." *Cruz*, 202 F.3d at 570 (quotations and citations omitted). Among the factors a court may use to evaluate the 'hostility' of a workplace are "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* 510 U.S. at 23.

Plaintiff charges that his supervisor created a hostile work environment by making "offensive" comments about Plaintiff. (Pl.'s Mem. Law at 9.) The comments Plaintiff cites to support this argument are his supervisor's remarks that "[Plaintiff] gave a lot of problems in his former department," that "[his supervisor] can never find [Plaintiff]," and that "[Plaintiff] does no work." (*Id.*) These comments, while unflattering, do not constitute the objectively abusive conduct necessary to establish hostile work environment harassment. Indeed, Plaintiff has failed to offer any evidence that the comments were related to his race rather than his performance. Cf. *Morgan,* 536 U.S. at 120 ("To support his claims of a hostile environment, [Plaintiff] presented evidence . . . that managers made racial jokes, performed racially derogatory acts, made negative comments regarding the capacity of blacks to be supervisors, and used various racial epithets."). There is no indication that the comments were "physically threatening or humiliating . . . [or that they] unreasonably interfere[d] with [Plaintiff's] work performance." *Harris,* 510 U.S. at 23.

The "totality of the circumstances" indicates that Plaintiff cannot sustain a hostile work environment charge. *Cruz,* 202 F.3d at 570. As such, Plaintiff may only raise claims related to conduct that took place within the 300-day period between April 19, 2001 and February 13, 2002, when he filed his complaint with the EEOC. Accordingly, while the Court may consider incidents that fall outside this time-frame, it may not grant summary judgment on any claims based on incidents that occurred before April 19, 2001.

C. Discrimination Claims

While summary judgment may be granted in discrimination cases, it is "sparingly used where intent and state of mind are at issue because . . . careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination." *Graham v. Long Island R.R.,* 230 F.3d 34, 38 (2d Cir. 2000) (citations omitted). Nevertheless, although courts must exercise caution in considering a motion for summary judgment in a Title VII case, "the ultimate burden rests with the plaintiff to offer evidence sufficient to support a reasonable inference that prohibited . . . discrimination occurred." *Woodman v. WWOR-TV, Inc.,* 411 F.3d 69, 76 (2d Cir. 2005) (quotation and citation omitted).

A court's analysis of an unlawful employment discrimination allegation proceeds according to the familiar burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The plaintiff bears the initial burden of establishing a *prima facie* case of discrimination through direct or circumstantial evidence. *Windham v.*

Time Warner, Inc., 275 F.3d 179, 187 (2d Cir. 2001). The plaintiff's burden at this stage is *de minimis,* and the requirement of meeting this burden "is neither onerous, nor intended to be rigid, mechanized or ritualistic." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) (internal quotations and citations omitted). To make out a *prima facie* discrimination claim, a plaintiff must demonstrate: (1) that he or she is a member of a protected class; (2) that he or she is qualified for the position in question; (3) that he or she suffered an adverse employment action; and that (4) the circumstances surrounding the adverse action give "rise to an inference of discrimination." *Windham,* 275 F.3d at 187 (citation omitted).

A plaintiff who is able to make out a *prima facie* case creates a presumption of discrimination and the burden of production shifts to the defendant. *See Woodman,* 411 F.3d at 76. The defendant must meet this burden by articulating a reason for the challenged conduct that, "*taken as true,* would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 509, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

If the defendant is able to present a nondiscriminatory explanation for the challenged conduct, "the presumption of discrimination drops out" and the burden of proof shifts back to the plaintiff. *Woodman,* 411 F.3d at 76 (citation omitted). The plaintiff must then prove "that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (quotations and citations omitted). In showing that

the employer's explanation was pretextual, the plaintiff need not prove that the explanation offered by the employer was entirely false, "but only that its stated reason was not the only reason" and that consideration of an impermissible factor "did make a difference." *Montana v. First Federal Sav. & Loan Ass'n of Rochester,* 869 F.2d 100, 105 (2d Cir. 1989). A plaintiff may satisfy his or her burden at the pretext stage, as at the *prima facie* stage, by showing that similarly situated employees outside the protected class received more favorable treatment than the plaintiff did. *Graham,* 230 F.3d at 43.

1. Unequal terms and conditions of employment

Plaintiff alleges that Defendant discriminated against him on the basis of his race by providing unequal terms and conditions of employment. Specifically, Plaintiff alleges that he was required to inform a manager when he left his department despite the fact that a similarly situated white co-worker was not required to do so, and that he was reprimanded for failing to comply with this requirement. (Pl.'s Mem. Law at 9.) Plaintiff further alleges that he was reprimanded in a separate incident for working through his lunch and 'punching out' early, which he alleges was standard practice for Home Depot employees. (Pl.'s Mem. Law at 10.)[1]

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[1] As previously discussed, Plaintiff's claims that are based on alleged discriminatory acts prior to April 19, 2001, including the disciplinary notice Rasheed issued Plaintiff on January 23, 2001, are time-barred. Rasheed's June 3, 2001 reprimand of Plaintiff for violating the terms of the January 23, 2001 disciplinary notice falls within the statutory filing period.

a. *Prima Facie* Case

A claim of unequal terms and conditions of employment is analyzed under the McDonnell Douglas burden-shifting framework. *See, e.g., Adams v. Debevoise & Plimpton,* 2004 U.S. Dist. LEXIS 14914, 2004 WL 1737826 (S.D.N.Y. Aug. 3, 2004). In the present case, Defendant concedes that Plaintiff meets the requirements of the first two prongs: that he is a member of a protected class and was qualified for his position. (Def.'s Mem. Law at 10.) As such, the Court considers only the third and fourth prongs – namely, whether Plaintiff has established that he suffered an adverse employment action under circumstances giving rise to an inference of discrimination.

An employee "sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment." *Galabya v. New York City Bd. of Educ.,* 202 F.3d 636, 640 (2d Cir. 2000) (internal quotations and citations omitted). Such a change must be "more disruptive than a mere convenience or an alteration of job responsibilities" to satisfy the plaintiff's *prima facie* burden. *Id.* (citation omitted). Examples of adverse employment actions include "discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." *Morris v. Lindau,* 196 F.3d 102, 110 (2d Cir. 1999).

In addition, lesser actions may be materially adverse, but "[b]ecause there are no bright line rules as to which employment actions meet the threshold for 'adverse,' courts must make this determination on a case-by-case basis." *Figueroa v. City of New York,* 198 F.Supp.2d 555, 567 (S.D.N.Y. 2002) (citation omitted); *see also Morris,* 196 F.3d at 110. Indicia of materially adverse changes include

"a material loss of benefits, significantly diminished material responsibilities," or a change resulting in diminished prestige or career advancement opportunities. *Galabya,* 202 F.3d at 640, 41. While negative evaluations, reprimands, or "close monitoring" alone may not constitute materially adverse changes, *Castro v. New York City Bd. of Educ. Personnel Dir.,* No. 96 Civ. 6314, 1998 U.S. Dist. LEXIS 2863, at *21, 1998 WL 108004 (S.D.N.Y. Mar. 12, 1998), such actions do become materially adverse if they lead to termination or a loss of benefits. See *Galabya,* 202 F.3d at 640; *Pellei v. Int'l Planned Parenthood Fed'n/ Western Hemisphere Region, Inc.,* No. 96 Civ. 7014, 1999 U.S. Dist, LEXIS 15338, at *27-8; 1999 WL 787753 (S.D.N.Y. Sept. 30, 1999).

In the instant case, Plaintiff was reprimanded for leaving his department unattended on June 3, 2001 and for punching out early on August 1, 2001, despite the fact that other employees allegedly engaged in the same conduct without being reprimanded. While Plaintiff did not receive a written notice for his conduct on June 3, 2001, his July 1, 2001 review documents the conduct for which he was reprimanded. In the review, his supervisor, Mohammed Rasheed, gave Plaintiff a rating of two out of five ("needs improvement") under the "Judgment" category, noting that Plaintiff needed to work to prevent further "discrepanc[ies]," "prioritize his task[s]" and be "more involved with [his] supervisor" and the assistant store manager. (Def.'s Aff. Ex. L at 4.) Plaintiff received a written disciplinary notice for his response to the August 1, 2001 reprimand where the assistant store manager stated that Plaintiff exhibited a "complete disregard [for] company procedures," and that Plaintiff's actions were "cause [for] termination." (Def.'s Aff. Ex. M.) Given that

Defendant has admitted that Plaintiff's performance and disciplinary record led Defendant to include Plaintiff in the September 2001 reduction in force, (Def.'s Reply Mem. Law at 10), the reprimands and disciplinary notices in question materially affected Plaintiff's employment conditions. As such, Plaintiff has established that he suffered an adverse employment action.

With regard to whether the adverse employment actions occurred under circumstances giving rise to an inference of discrimination, Plaintiff alleges that other Home Depot employees engaged in the same conduct for which Plaintiff was reprimanded without negative consequences. A plaintiff may satisfy the "inference of discrimination" prong of the *prima facie* case by showing that the employer subjected him to less favorable treatment than a similarly situated employee outside of the plaintiff's protected class. *Graham,* 230 F.3d at 39. In order to be similarly situated, (1) the plaintiff and the employee with whom he compares himself must be "subject to the same workplace standards," and (2) "the conduct for which the employer imposed discipline [must be of] comparable seriousness." *Id.* at 40. While there must be a "reasonably close resemblance of the facts and circumstances of [the] plaintiff's and comparator's cases," the plaintiff need not show that the circumstances are identical. *Id.* Additionally, unless "it is clear that no reasonable jury could find the similarly situated prong met," whether two employees are similarly situated "is a factual issue that should be submitted to the jury." *Harlen Assocs. v. Inc. Vill. of Mineola,* 273 F.3d 494, 499 n.2 (2d Cir. 2001).

Plaintiff has alleged that Jeff, a white sales associate in his department, engaged in substantially similar conduct as Plaintiff by leaving the department without

informing a manager and was not reprimanded. (Pl.'s Mem. Law at 20.) Because Jeff and Plaintiff shared the same title and worked in the same department under the same supervisor, there is every indication that both employees were "subject to the same workplace standards." *Graham,* 230 F.3d at 40. Plaintiff's allegation that Jeff engaged in precisely the same conduct as Plaintiff without being reprimanded is supported by the affidavit of Plaintiff's former co-worker Ian Doyen, who stated that Plaintiff was "the only sales associate I have seen or heard of getting a disciplinary notice for assisting in another department," and who also stated that other Home Depot employees, besides Jeff, engaged in the same conduct with impunity (Doyen Aff. at 2.)[2] Doyen. (Doyen Aff. at 2.) Doyen, who is African-American, states that he was not subject to the same treatment as Plaintiff (*id.* at 1, 4), and thus fails to support Plaintiff's contention that he was discriminated against because of race. While Plaintiff may have been singled out and treated differently in one instance than his white co-worker, there is no indication that this treatment was based on racial discrimination. Accordingly, although Plaintiff identifies a white co-worker who was similarly situated, and who allegedly engaged in the same conduct as Plaintiff without being reprimanded, Plaintiff has presented insufficient evidence to support an

[2] Contrary to Defendant's assertion that Doyen could have no personal knowledge regarding whether other employees received disciplinary notices for engaging in similar conduct because Doyen had no "supervisory authority or access to other employees' personnel files," (Def.'s Reply Mem. Law at 5), the Court notes that Doyen referred only to associates he had "seen or heard of." (Doyen Aff. at 2.) Doyen needs no supervisory authority to comment on whether associates with whom he was acquainted received disciplinary notices for particular conduct.

inference of discrimination in the adverse employment action in question.

With regard to the August 1, 2001 reprimand, Plaintiff's broad statement that it was customary for sales associates to work through lunch and leave early fails to identify a specific, similarly situated employee for comparison. (Pl.'s Mem. Law at 11; Pl.'s Dep. at 157; Doyen Aff. at 2.) While Plaintiff states in his deposition that the co-worker who drove him home on the day he was reprimanded also left early and that Plaintiff was unduly singled out, Plaintiff has not shown that the unnamed co-worker was subject to the same workplace standards as Plaintiff or that the co-worker did not belong to Plaintiff's Title VII-protected class. As such, there is no "objectively identifiable basis for comparability" between Plaintiff and the unnamed co-worker. *Graham,* 230 F.3d at 40 (citation omitted).

Accordingly, the Court finds that Plaintiff has failed to meet his initial burden of establishing a *prima facie* case of discrimination.

b. Defendant's Non-discriminatory Rationale

If Plaintiff had successfully established a *prima facie* case, the burden would pass to the employer to offer a legitimate, non-discriminatory business rationale for the adverse employment action. *Woodman,* 411 F.3d at 76.

Defendant's explanation for the June 3, 2001 reprimand is that Plaintiff was disciplined for disregarding his supervisor's instructions not to leave the department without first informing a manager. (Def.'s Mem. Law at 4.) Specifically, Defendant states that while "Home Depot

encourages its sales associates to walk customers to other departments . . . Plaintiff was disciplined because his supervisor found him [in another department] instead of working in the plumbing department where he was assigned." (Def.'s Reply Mem. Law at 4.)[3] To support the distinction it draws between assisting customers and assisting co-workers, Defendant references the 1999 Home Depot Orientation Guide, which instructs employees to walk customers to other departments, and does not mention assisting co-workers (*Id.*; Pl.'s Aff. Ex. 8.) Accordingly, even if Plaintiff had established a *prima facie* case, Defendant's explanation for the disciplinary action, which is based on established company policy, is a legitimate business rationale for the reprimand in question, and as such, Defendant would have rebutted Plaintiff's *prima facie* case.

c. Pretext

Once an employer offers a legitimate explanation for the conduct in question, the burden of persuasion shifts back to the plaintiff, who must prove by a preponderance of the evidence "that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves,* 530 U.S. at 143 (2000). A plaintiff's identification of a similarly situated employee outside the protected class who received more favorable treatment not only satisfies the plaintiff's *prima facie* burden, but can also show that the defendant's explanation for its conduct was a pretext for discrimination.

[3] Defendant offers this explanation for the January 23, 2001 disciplinary notice. The Court presumes that the same rationale applies to the June 3, 2001 reprimand.

Graham, 230 F.3d at 43. Accordingly, because Plaintiff's similarly situated argument failed to establish a *prima facie* case, he fails to show that Defendant's legitimate explanation was merely pretext for racial discrimination.

The Court therefore finds that there is no genuine issue of material fact regarding whether Plaintiff was subjected to discipline on a discriminatory basis. Accordingly, Defendant's summary judgment motion is GRANTED as to Plaintiff's claim of unequal terms and conditions of employment.

2. Termination

Plaintiff alleges that discrimination was a motivating factor in Defendant's termination of Plaintiff's employment in September 2001. As was the case for Plaintiff's claim of unequal terms and conditions of employment, the Court's analysis of an unlawful termination claim follows the McDonnell Douglas shifting-burdens framework

a. *Prima Facie* Case

Defendant concedes that Plaintiff is a member of a protected class and that he was terminated. (Def.'s Mem. Law at 17-18.) As such, only the second and fourth prongs of Plaintiff's *prima facie* case – whether Plaintiff was qualified for his position and whether the circumstances surrounding his termination give rise to an inference of termination – are addressed here.

The Second Circuit has made it clear that for a plaintiff to be qualified for a particular position, he must meet the "criteria the employer has specified for the position." *Thornley v. Penton Publ., Inc.,* 104 F.3d 26, 29 (2d Cir.

1997). Unless the employer sets the qualification criteria in bad faith, whether job performance is satisfactory "depends on the employer's criteria for the performance of the job – not the standards that may seem reasonable to the jury or judge," *Thornley,* 104 F.3d at 29. Among the clearest indicia of whether an employee meets the employer's performance criteria are supervisors' performance evaluations of the employee's work. *Meiri v. Dacon,* 759 F.2d 989, 995 (2d Cir. 1985).

While in every performance review Plaintiff received at the Home Depot – including those immediately following incidents of disciplinary action – Plaintiff was rated three out of five, which signifies "Solid Performance" and indicates that Plaintiff "[m]eets job expectations" (Def.'s Aff. Ex. F, G, I, L), it cannot be said that Plaintiff necessarily met the employer's performance criteria. Defendant argues that "Plaintiff's history of performance problems . . . arguably rendered Plaintiff unqualified for his position and, thus, unable to satisfy the second prong of the *prima facie* case." (Def.'s Mem. Law at 17-18.) Between October 1999 and September 2001, Plaintiff received five disciplinary notices for absenteeism and insubordination. (Def.'s Aff. Ex. E, H, J, K, M.) Additionally, his performance reviews rated Plaintiff as "need[ing] improvement" in several specific job categories. (Def.'s Aff. Ex. F, G, I, L.) Given this documented evidence from Plaintiff's personnel record, the Court finds that Plaintiff failed to meet Defendant's performance criteria to be qualified for his position, and thus fails to satisfy the job qualification prong of the *prima facie* case.

Plaintiff also fails to satisfy the fourth prong of establishing a prima facie case of termination. As discussed, a plaintiff may show that an adverse employment action

occurred under circumstances giving rise to an inference of discrimination by establishing that similarly situated employees outside of the plaintiff's protected class engaged in similar conduct and received more favorable treatment. However, establishing disparate treatment is only one of several means by which a plaintiff may raise an inference of discrimination. Among the other circumstances that might give rise to an inference of discriminatory intent are "the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; . . . or the sequence of events leading to the plaintiff's discharge." *Abdu-Brisson,* 239 F.3d at 468 (quoting *Chambers v. TRM Copy Ctr. Corp.,* 43 F.3d 29, 37 (2d Cir. 1994)). The "fourth element set forth in McDonnell Douglas is a flexible one that can be satisfied differently in differing factual scenarios." *Chertkova v. Connecticut Gen. Life Ins. Co.,* 92 F.3d 81, 91 (2d Cir. 1996).

Plaintiff does not allege any invidious comments about his race, but alleges that the sequence of events leading up to his termination gives rise to an inference of discrimination. Between June and August, Defendant hired 30 new employees to work the night shift as part of Home Depot's "SPI Program." (Def.'s Mem. Law at 20.) Shortly after the new employees started, Defendant terminated Plaintiff along with seven other African American employees, one Hispanic employee and one white employee as part of a reduction in force. (Pl.'s Aff. Ex. 18 at 5.) While the Court may not substitute its judgment for Defendant's in business decisions,

> where, as here, the plaintiff claims not that [his] employer used poor business judgment in discharging [him] but that [the] employer used the

> structural reorganization as a cover for discriminatory action, a federal court, to ensure that the business decision was not discriminatory, is not forbidden to look behind the employer's claim that it merely exercised a business decision in good faith.
>
> *Montana,* 869 F.2d 100, 106.

Defendant claims that its decision to hire thirty new employees was based on a new program to organize store merchandise at night and was unrelated to the subsequent termination of Plaintiff and the other employees, which was based on budgetary concerns and the effects of the September 11 terrorism acts. (Def.'s 56.1 ¶¶ 28, 32-33.) As Defendant has offered a valid, non-discriminatory reason for its business decision, the Court finds Plaintiff has failed to establish any inference of discrimination, and thus has not established a *prima facie* case of discrimination.

b. Defendant's Non-discriminatory Rationale

Even if Plaintiff had successfully established a *prima facie* case of termination based on racial discrimination, his claim would fail in the total analysis. To rebut the presumption of discrimination a plaintiff creates by establishing a *prima facie* case, a defendant must offer a non-discriminatory explanation for a plaintiff's termination. Defendant states that the September 2001 reduction in force was necessitated by the fact that the number of employee hours billed in particular departments exceeded the number of hours budgeted. (Def.'s Mem. Law at 19.) Defendant claims that the reduction in force was further necessitated by the economic slump that resulted from the

terrorist attacks of September 11, 2001. (*Id.*) In determining which employees would be included in the reduction in force, Defendant claims to have relied upon employees' performance and disciplinary records. (Def.'s Reply Mem. Law at 10.)

As evidence to support these explanations, Defendant submits an affidavit of Michael Weinman, an assistant store manager at the time of Plaintiff's termination who was involved in determining which employees would be included in the reduction in force. (*Id.*) In his affidavit, Weinman states that it is Home Depot's policy to use employees' performance and disciplinary records in determining which employees to include in a reduction in force, and that Defendant followed this policy in terminating Plaintiff. (Weinman Aff. at 3; Weinman Supp. Aff. at 2.) An affidavit of the person responsible for implementing an employer's reduction in force articulating a reasonable explanation for the decision satisfies a defendant's burden at this stage of the McDonnell Douglas analysis. See *Viola v. Philips Medical Sys of N. Am.*, 42 F.3d 712, 717 (2d Cir. 1994). Defendant has thus rebutted the presumption of discrimination in its termination of Plaintiff.

c. Pretext

In seeking to prove that Defendant's non-discriminatory explanation for Plaintiff's termination was a pretext for unlawful discrimination, Plaintiff argues that he should not have been included in the reduction in force based on his performance and disciplinary record. (Pl.'s Mem. Law at 13.)[4] Plaintiff contends that because he

[4] In addition, Plaintiff alleges that Defendant's records for the reduction in force were forged and that Defendant's financial circumstances

(Continued on following page)

consistently received overall performance ratings of three out of five ("Meets job expectations"), Defendant should have terminated a different employee with a poorer performance record. (Pl.'s Dep. at 194.) Defendant argues that Plaintiff cannot support his allegation that Defendant's articulated business rationale was a pretext for discrimination because Plaintiff has failed to identify any employee with a poorer performance record than Plaintiff who should have been terminated in Plaintiff's place. (Def.'s Mem. Law at 18.)

Plaintiff has not established a material issue of fact as to whether discriminatory animus influenced his performance and disciplinary record, and furthermore, has failed to identify a comparable employee with a poorer performance record who was not terminated in the reduction in force, which is fatal to his discriminatory termination claim. Even if Plaintiff's satisfactory performance ratings showed that he was qualified for the position he held, "[job qualification] is not sufficient to create an inference of discriminatory intent." *Viola,* 42 F.3d at 718. An employee is not entitled to continued employment solely on the grounds that he received satisfactory performance reviews; absent any evidence to the contrary, it is entirely plausible that the lowest-rated employee at the New Rochelle Home Depot received consistently satisfactory reviews.

Accordingly, Plaintiff has not raised a genuine issue of material fact regarding whether his performance and disciplinary records were tainted by discrimination, and

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did not necessitate a reduction in force in the first place. The Court finds no evidence to support these allegations.

Plaintiff has failed to establish a material issue as to whether Defendant's purportedly non-discriminatory rationale for the termination – which was based on Plaintiff's admittedly poor "performance reviews . . . [and] extensive record of disciplinary notices"[5] – was a pretext for discrimination. (Def.'s Reply Mem. Law at 10.) Accordingly, Defendant's summary judgment motion based on Plaintiff's discriminatory termination claim is GRANTED.

3. Retaliation

Plaintiff alleges two instances of discriminatory retaliation. First, Plaintiff charges that on October 13, 2000, he was involuntarily transferred to the plumbing department in retaliation for his complaint on August 9, 2000 that his manager had issued him an undeserved disciplinary notice. (Pl.'s 56.1 ¶ 13; Am. Compl. at 3-4; Def.'s Aff. Ex. N.) Additionally, Plaintiff alleges that the disciplinary notice issued by Assistant Store Manager Jose Chan on August 1, 2001 was a retaliatory response to Plaintiff's June 7, 2001 complaint that his supervisor, Mohammed Rasheed, had undeservedly reprimanded him. (Am. Compl. at 4; Pl.'s Aff. Ex. 29; Pl.'s 56.1 ¶ 19.) Because the Court has already found that claims arising from acts that occurred before April 19, 2001 are time-barred, only the second of these claims is considered here.

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[5] Plaintiff also alleges that he was informed that the January 2, 2001 disciplinary notice would be removed from his record after the assistant store manager acknowledged that it was issued in error. (Pl. Dep. at 87.) The alleged failure by Defendant to follow through on the promise to remove this notice from Plaintiff's record is not dispositive on this issue.

The requirements for establishing a *prima facie* case of retaliation differ from the elements of an intentional discrimination claim. To make out a *prima facie* case of discriminatory retaliation in violation of Title VII, a plaintiff must prove: "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) adverse employment action; and (4) a causal connection between plaintiff's protected activity and the adverse employment action." *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 113 (2d Cir. 2000).

For purposes of a Title VII retaliation claim, "the term 'protected activity' refers to action taken to protestor oppose statutorily prohibited discrimination." *Cruz*, 202 F.3d at 566 (quoting 42 U.S.C. § 2000e-3). Specifically, "Title VII defines protected activities as (1) an employee's opposition to any activity which is prohibited by Title VII, or (2) an employee's participation in any Title VII investigation or proceeding." *Robinson v. Time Warner, Inc.*, 92 F.Supp.2d 318, 330 (S.D.N.Y. 2000). Title VII not only protects employees who file formal complaints with the EEOC and comparable state and local agencies, but also protects "informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges." *Sumner v. U.S. Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990).

However, not every informal employee complaint constitutes Title VII-protected activity. An employee must allege some form of discrimination prohibited by Title VII for the complaint to be protected. *See Woods v. N.M.C. Laboratories*, No. 93 Civ. 2908, 1997 WL 1038873, at *2

(E.D.N.Y. Jul. 14, 1997); *Sumner,* 899 F.2d at 211. Employees "certainly [have] a right to complain about unfair treatment, but this is not a Title VII-protected right" unless the employee states or implies that the treatment complained of is discriminatory. *Woods,* 1997 WL 1038873, at *2.

Because he has failed to show that he engaged in protected activity, Plaintiff cannot make out a *prima facie* case of discriminatory retaliation. Plaintiff complained twice in June 2001 about the conduct of his supervisor, Mohammed Rasheed. In his call to the "Alert Line" on June 7, 2001, Plaintiff complained that Rasheed "harasse[d] him" by giving Plaintiff an "unjust" reprimand. (Pl.'s Aff. Ex. 25.) Plaintiff expressed concern over the fact that Rasheed's comments that Plaintiff "had problems while working in his previous department" and that Plaintiff was hard to find and did not do his work would influence Plaintiff's performance reviews and pay increases. (*Id.*) In his written complaint regarding the same incident, Plaintiff stated that Rasheed's "defamation and harassment of character" would negatively impact Plaintiff's career growth at Home Depot. (Pl.'s Aff. Ex. 26 at 3.) In neither complaint did Plaintiff state or imply that he thought he was being treated unfairly because of his race. Plaintiff's complaint of being harassed and defamed alone is not protected by Title VII. An undisclosed belief that the treatment to which Plaintiff was subjected was based on his race does not convert a customary employee complaint into Title VII-protected activity. *See Woods,* 1997 WL 1038873, at *2.

Because Plaintiff has failed to establish a *prima facie* case of discriminatory retaliation, Defendant's summary judgment motion on this basis is GRANTED.

III. CONCLUSION

For the reasons set forth above, Defendant's summary judgment motion is granted. The Clerk of the Court is directed to close the case.

SO ORDERED.

Dated: New York, New York
September 29, 2005

/s/ Deborah A. Batts
DEBORAH A. BATTS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date: Filed Jan. 23, 2007

Docket Number:	05-6347-cv
Short Title:	Williams v. Home Depot, Inc
DC Docket Number:	02-cv-5353
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Deborah Batts

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of January two thousand seven.

Present:

Hon. Roger J. Miner,

Hon. Joseph M. McLaughlin,

Hon. Robert A. Katzmann,

CIRCUIT JUDGES,

Williams v. Home Depot USA, Inc.

A petition for panel rehearing having been filed herein by Robert Williams,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

For the Court,

Thomas Asreen, Acting Clerk

By: /s/ Arthur M. Heller
Motion Staff Attorney